IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.43 OF 2006
WITH
CIVIL APPLICATION NO.42 OF 2006
WITH
CIVIL APPLICATION NO.183 OF 2006
WITH
CIVIL APPLICATION NO.232 OF 2006

AND

APPEAL FROM ORDER NO.44 OF 2006
WITH
CIVIL APPLICATION NO.43 OF 2006
WITH
CIVIL APPLICATION NO.184 OF 2006
WITH
CIVIL APPLICATION NO.233 OF 2006

Intercon Real Estate Developers.
89, Ararat, N.M.Road,
Fort, Mumbai 400 023. ..Appellant.

V/s.

1. M/s.Modern Restaurant
Kwality House, Ground floor,
Kemp's Corner, Mumbai-400 036.

2. Madan Mohan Paradi,

3. Mr.Pyarelal Bhardwaj,

4. Mrs. Krishna Kumar Ghai

5. Rajkumar Lamba Family Trust,
C/o M/s. Modern Restaurants,
Kwality House, Ground floor,
Kemp's Corner, Mumbai 400 036.

6. Orion Advertisers
4B, 4th floor, Tardeo A.C.Market,
Mumbai 400 034. ..Respondents.

Mr. N.V.Walawalkar, Sr.Advocate with Ms.Sheetal Sampat i/b Vimadalal & Co. for appellant.

Mr.Kishore Jain with Joe Fernandes for Respondent No.1 to 5.

Mr. Navin Parikh with Ms.Hetal Parikh for respondent No.6.

CORAM: A.M.KHANWILKAR,J
DATE : MARCH 20, 2006.

P.C.:

1. Heard both sides at length. Perused the relevant documents and pleadings on record.

2. This common order will dispose of both the appeals and six civil applications filed in the respective appeals. The former Appeal from Order No.43 of 2006 is directed against the Judgment and Order passed by the Trial Court dated 9th September, 2005 in Notice of Motion No.5181 of 2004 in S.C.Suit No. 5878 of 2004. The later is filed against self-same common Judgment and Order dated 9th September, 2005 passed by the Trial Court in Notice of motion No. 5150 of 2004 in S.C.Suit No.5769 of 2004.

3. For the sake of brevity I will refer to the contesting parties as "Ashar" on one hand and Intercon Real Estate Developers Private Ltd. as "Intercon" on the other hand. The original owner of the suit building are supporting the cause of Ashar. The dispute relates to right to display hoarding on the suit building which was enjoyed by Ashar in terms

of the agreement. According to Ashar the said agreement is subsisting one. On the other hand, according to the Intercon, Ashar had no right to display the hoarding on the suit building. This is so because Ashar claimed that right in terms of agreement executed in his favour by the original owners of the building who themselves have had no subsisting right. Whereas, in view of the rights assigned under the Deed of Assignment in favour of Agarwal which has now vested in Intercon, the Intercon enjoys 2/3 rights even in the terrace premises, besides, being owner of the first and second floor premises in the suit building. I am not elaborating the facts which led to filing of two suits between the parties which are already referred to in the impugned Judgment. Suffice it to observe that as representatives of the Intercon obstructed Ashar from displaying hoarding or for that matter entering upon terrace portion so as to change the advertisement on the hoarding, he filed suit in the City Civil Court being S.C.Suit No.5769 of 2004 for the following reliefs.

> (a) that this Honourable Court be pleased to restrain Defendant No.6, its agents, servants, representatives, security personnel, watchmen and or any person or persons claiming under or through it by a perpetual order and injunction

from in any manner stopping, obstructing, preventing, causing any hindrance or obstacle to the Plaintiff from displaying advertisements from the suit hoarding fixed on the outer wall between the 2nd floor and the terrace of the building known as Kwality House, Kemp's Corner, near the Peddar Road Fly-over, August Kranti Marg, Bombay 400 036 and from having free access thereto, inter alia, through the terrace of the said building Kwality House;

(b) that pending the hearing and final disposal of the suit Defendant No.6, its agents, servants, representatives, security personnel, watchmen and/or any person or persons claiming under or through it be restrained by an order and injunction of this Hon'ble Court from in any manner stopping, obstructing, preventing, causing any hindrance or obstacles to the Plaintiff from displaying advertisements from the suit hoarding fixed on the outer wall between 2nd floor and the terrace of the building known as Kwality House, Kemp's Corner, near Peddar Road Fly-over, August Kranti Marg, Bombay 400 036 and from having free access thereto, inter alia, through the terrace of the said building Kwality House during such hours and on such terms and conditions as this Hon'ble Court deems fit and proper for the purpose of enabling the workers, mechanics, painters, electricians and/or representatives of the Plaintiff to increase the size of the board as per the Municipal sanction, change/replace the display on the suit hoarding and/or attend to, pain rectify, repair and/or replace the suit hoarding or any part or portion thereof;

(c) that ad-interim orders in terms of prayer clause (b) above be granted.

(d) that the cost of the suit be provided for

and

(e) that such other and further reliefs as the nature and circumstances of the case may require be granted.

In the said suit Ashar prayed for interim relief during the pendency of the suit consistent with prayer clause (b) referred to above.

4. On the other hand, Intercon filed another suit being S.C.Suit No.5878 of 2004 in the same court for the following reliefs.

(a) that this Hon'ble Court be pleased to declare that the defendant Nos. 1 to 5 have no right, title and interest or authority to create any rights in respect of the Hoarding Rights in the said building "Kwality House" at Kemp's Corner, Mumbai-400 036 and to derive and generate profits and benefits therefrom to the exclusion of the plaintiff without the consent and knowledge of the plaintiff in view of the plaintiff having 2/3 undivided right tin the said building and Hoarding Rights and further that the alleged rights created in favour of the defendant No.6 by the Defendant Nos.1 to 5, under undisclosed agreements, are bad-in-law, illegal and not binding upon the plaintiff;

(b) that the defendant Nos.1 to 5 are bound and liable to disclose to the plaintiff the true nature of transaction and right created in favour of the defendant No.6 in respect of the Hoarding Rights and give and provide proportionate 2/3 benefit thereof to the plaintiff and the defendant Nos.1 to 5 be ordered decreed and directed to provide the proportionate 2/3 share in

favour of the plaintiff in respect of the Hoarding Rights;

(c) that this Hon'ble Court be pleased to restrain the defendant Nos. 1 to 5 by an order of permanent injunction from in any manner dealing with, disposing off, creating or granting or assigning right in respect of Hoarding Rights on the building on the building "Kwality House", Kemp's Corner, Mumbai-400 036, save and except without consent of the plaintiff in writing;

(d) that pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to restrain the defendant Nos. 1 to 5 by an order of temporary injunction from in any manner dealing with, disposing off, creating or granting or assigning right in respect of Hoarding Rights on the building "Kwality House", Kemp's Corner, Mumbai-400 036, save and except without consent of the plaintiff in writing;

(e) that pending the hearing & hearing and final disposal of the present suit, this Hon'ble Court be pleased to restrain the defendant No.6 from in any manner using, utilizing the space in the building for putting up any Hoarding, without consent of the plaintiff and the defendant No.6 be directed by an mandatory order of injunction to forthwith remove and uninstall the Hoarding put up on the building "Kwality House", Kemp's Corner, Mumbai-400 036;

(f) that pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to direct the defendants to place on record the true transaction and the alleged rights created in favour of defendant No.6 by defendant Nos. 1 to 5, by disclosing the same on affidavit and annexing all the documents in support thereof along with the affidavit and further defendant No.6 be directed to deposit

the monthly compensation with the Plaintiffs;

(g) interim and ad-interim reliefs in terms of prayer clauses (d) to (f) be granted.

(h) such other reliefs as the Court may required;

(i) costs of the suit be provided for;

Intercon took out Notice of Motion No.5181 of 2004 in the said suit consistent with the interim relief prayed in the above terms. Ashar took out Notice of Motion No.5150 of 2004 in S.C.Suit No.5769 of 2004. Both these notice of motions have been heard and disposed of together by the trial Judge by the common Judgment and order dated 9th September, 2005.

5. The first controversy that has been addressed by the Trial Court in the impugned Judgment is the nature of rights enjoyed by Ashar. The trial Judge after considering the relevant materials on record has taken the view that the right which was available to Ashar in terms of agreement executed by the representative of original owners continued to operate and the subsequent agreement of Deed of Assignment or purchase of first floor and second floor of the suit building by Intercon does not affect the said right of Ashar. The trial Judge has taken the view that the right in favour of the Ashar

has been created by M/s.Modern Restaurant which enured in favour of Ashar under the agreement executed on 25th July, 2002 for a period of five years and was subsisting one. The trial Judge has then noted that although the deed of assignment in favour of Agarwal was executed in 1997, however, at no point of time any obstruction was caused to Ashar in exercising his right under the licence agreement executed in his favour by the original owners. The trial Judge has also noted that there is already pending dispute between the original owners and Intercon questioning transaction of assignment under which intercon claims to have acquired right in respect of second floor of the suit building. In view of the pendency of the said dispute, it was not open to challenge the right of Ashar which is created in terms of agreement executed by the owners and their representatives. The trial Judge has also observed that it is not open to the City Civil Court to dwell upon the issue which may be relevant for consideration in the suit pending between the original owners and Intercon. The trial Judge has then adverted to Clause (G) and (F)(ix) of the assignment agreement in relation to the first floor dated 28.8.1997 whereunder the Intercon acquired right in respect of the one third undivided share in

terrace. The trial Judge has found that the said agreement of assignment does not affect the right of Ashar to put up hoarding on terrace above the second floor. The trial Judge has then adverted to assignment agreement dated 10th September, 2004 which pertains to second floor in the suit building. While referring to clause Nos. 1, 10, 11 12 and Second Schedule of the said agreement, it is found that even this agreement will not affect the right of Ashar to display hoarding on the terrace above the second floor. It is noted that the agreement creates right on "AS IS WHERE IS' and "AS IS WHAT IS " basis, for which reason will not affect the agreement executed in favour of Ashar. Taking this view of the matter the trial Judge was pleased to accept the plea pressed into service on behalf of Ashar and granted interim injunction as prayed for. While doing so, the trial Judge has directed the original owners defendant No.1 to 5 to hand over key of the lock on the terrace to Ashar so as to implement the order passed. Similar direction has been given to Intercon to remove the lock put up by Intercon on the terrace so as to enable Ashar to implement the order. The operative order passed by the trial court reads thus:

ORDER

1. Notice of Motion No.5150/04 in S.C.Suit

No.5769/04 is made absolute in terms of prayer clause (a).

2. There is no order as to cost.

3. Pending the hearing and final disposal of the suit defendant No.6, its agents, servants, representatives, Security Personnel and watchmen and/or any person or persons claiming under or through it are hereby restrained by an order and injunction of this Court from in any manner stopping, obstructing, preventing, causing any hindrance or obstacles to the plaintiff from displaying advertisements from the suit hoarding fixed on the outer wall between the 2nd floor and the terrace of building know as Kwality House, Kemp's Corner, near Peddar Road Fly over, August Kranti Marg, Mumbai 400 036 and from having free access thereto inter alia through the terrace of the said building Kwality House and for the purpose of enabling the workers, his mechanics, painters, electricians and/or representatives of the plaintiff to increase the size of the board as per municipal sanction, change/replace the display on the suit hoarding and/or attend to, paint, rectify, repair and/or replace the suit hoarding or any part or portion thereof.

4. The Ld. Advocate Mr.Fernandes for defendants 1 to 5 states that defendants 1 to 5 have put up their lock to the terrace and he is prepared to hand over key of the said lock to the Plaintiff Mr. Ashar.

5. Thus, defendant 1 to 5 are directed to hand over key of the lock on the terrace to the plaintiff so as to enable the plaintiff to implement the said Order granted above.

6. At the same time, I am told that there is lock put up by M/s Intercon Real Estate Developers Pvt.Ltd. on the terrace and hence, they are also directed to open the said lock of the

terrace so as to enable the plaintiff to implement the order granted above.

7. The plaintiff is directed to give sufficient advance notice to defendants 1 to 5 and to M/s Intercon Real Estate Developers Pvt.Ltd. for doing anything with regard to the suit hoarding on the terrace.

8. In so far as Notice of Motion No.5181 of 2004 in S.C.Suit No.5878 of 2004 of the plaintiffs is concerned, the same is dismissed.

9. There is no order as to cost.

10. S.C.Suit No.5769 of 04 and S.C.Suit No.5878 of 2004 are adjourned to 24.10.05 before Court room No.2 for direction.

11. Later on : At the request of Ld.Advocate Ms.Hetal Patel for the plaintiff Mr.Ashar the following order is passed.

12. Sheristedar is directed to furnish authenticated copy of roznama to the Ld.Advocate for the plaintiff Mr.Ashar and to defendants 1 to 5.

13. Both parties to act upon certified copy of roznama to implement the Order.

6. As the order was adverse to Intercon, two separate appeals from order have been filed by Intercon before this court. When these appeals from order came up for hearing on 22nd January, 2006 it

was contended that specific plea was taken before the trial Court that the document pressed into service on behalf of Ashar dated 25th July, 2002 was fabricated document. It was contended that the said point was argued before the trial Court, which fact is reinforced from the contents of the impugned Judgment as reference has been made by the trial Judge to that aspect. However, the trial Judge failed to adjudicate that issue. In the backdrop of this contention it was thought appropriate to invite finding of the trial Judge on the issue as to whether the document dated 25th July, 2002 was a fabricated document. The trial Judge by his decision dated 18th February, 2006 has returned finding on the said issue as was invited by this court. The trial court has observed that error appearing in the document is obviously a clerical or typographical error and that no advantage is passed on or taken or received by Ashar on account of so called manipulation of the date as the licence period of the earlier agreement was in force. What is relevant to note is that the trial court has clearly found that the jurisdictional facts relevant to question the document being fabricated are not set out in the affidavit in reply nor in any of the pleadings filed on behalf of the Intercon. If so, the trial Judge has noted that, the

question of entering upon the controversy whether the document is fabricated or not does not arise. Nevertheless, even on merits the trial Judge answered the said issue against Intercon. By way of Civil application Nos.232 of 2006 and 233 of 2006, finding recorded by the trial Judge on the above issues has been questioned before this court. In other words, the entire controversy arising out of impugned common Judgment dated 9th September, 2005 as well as emanates from the finding recorded in the order dated 18th February, 2006, both passed by the trial court, is put in issue in the present appeals.

7. Essentially, three contentions have been raised on behalf of the appellant Intercon before this court. First contention is that Ashar had no right to display hoarding on the terrace. It is submitted that the source of right available to Ashar has not been established. The documents which are pressed into service on behalf of Ashar are not by the original owners. The second argument canvassed before me is that since the appointment of court receiver, the court receiver was in possession of the suit premises. Consequently, the agreement executed in favour of Ashar on 25th July, 2002 will be illegal and cannot be sustained in law. The third contention

raised before me is that taking any view of the matter, the trial Judge has exceeded its jurisdiction in issuing mandatory order directing the appellant to remove the lock from the suit premises. That too without recording any separate or special reasons for issuance of such direction and when no such relief is claimed in the Notice of Motion filed by Ashar.

8. I shall straightway deal with the first contention raised on behalf of the appellant. To addressed this aspect, I will advert to the relevant documents, on which, reliance is placed on behalf of Ashar. According to Ashar, right to display hoardings was given to him under agreement dated 2nd August, 1989. That agreement was executed by M/s. Kwality Catering Services, a Partnership firm. In the recital, it is mentioned in paragraph clause (1) of the agreement that Kwality Catering Services had full right and authority to enter into the said agreement. By virtue of clause (2) Said Ashar was granted permission to erect and display illuminated hoarding of size not exceeding 30ft. in length and 10 ft. in height on the said building overlooking Flyover, for a period of 5 years commencing from 1st August, 1989, provided however, after obtaining necessary permission from the local authorities. It

is not necessary to advert to the other terms and conditions of the agreement. This agreement was to subsist for a period of 5 years from 1st August, 1989. The said right was extended in favour of Ashar under another agreement executed between Kwality Catering Services and Ashar on 1st August, 1994. The terms contained in the second agreement are more or less repetition of the terms provided for in the earlier agreement. It is indisputable that on the basis of the first agreement of August 1989 Ashar erected and displayed an illuminated hoarding of the size not exceeding 30 ft. in length and 10 ft. in height, after obtaining necessary permission from the authorities. And since then advertisement of different agencies were displayed on the said hoarding from time to time till recently. Besides, at no point of time the predecessor in title of the Appellant Intercon challenged the authority of Kwality Catering Services to grant licence in favour of Ashar. Moreover, the original owners have supported the claim of the said Ashar that he was legitimately granted licence by Kwality Catering Services. We are not concerned with whether all the terms provided in the agreement executed between Kwality Catering Services and Ashar have been complied or not. The next agreement which was

executed is dated 1st August, 1997, once again by Kwality Catering Services. Recital of this agreement states that the building belongs to and is owned by M/s. Modern Restaurant who has granted right and authority to M/s. Kwality Catering Services to install/fix a hoarding structure/Board admeasuring 30 ft. x 10 ft. on the terrace between second floor and terrace of the said building. In the third recital, it is mentioned that Kwality Catering Services are the lessees of M/s Modern Restaurants in the said building. The term of license provided in this agreement is five years, as per clause (2) of the agreement. The other terms of this agreement are more or less repetition of the earlier agreements executed between the Kwality Catering Services and Ashar. While this agreement was subsisting the fourth agreement on which Ashar would rely was executed on 25th July, 2002, once again by Kwality Catering Services. As per this agreement, the said Ashar would be entitled to display hoarding for a period of five years from 1st August, 2002. There is one change which is brought about in this agreement. The size of the hoarding is allowed to be increased to 30 ft. length x 20 ft.height. On considering all these documents singularly or together, it is obvious that Ashar came on the scene on execution of the

agreement dated 2nd August, 1989. Hoarding has been erected by Ashar. Ashar has also secured necessary permission from all the local authorities for displaying advertisement on the said hoarding. Since 1989 the hoarding is in place on the terrace. The original size of hoarding viz. 30 ft. length x 10 ft. height has been subsequently increased to 30 ft. length x 20 ft.height in terms of agreement dated 25th July, 2002. The right subsisting in favour of Ashar to display hoarding on terrace under agreement dated 25th July, 2002 is for a period of five years from 1st August, 2002, which means the same still subsists.

9. To get over this position, the appellant would contend that Kwality Catering Services had no right to enter into agreement with any person much less Ashar. It is not possible to accept this submission. For, the original owner has supported the claim of Ashar. Moreover, the documents relied by Ashar issued in his favour by Kwality Catering Services clearly refer to the authority of the executant. That the predecessor in title of the Appellant Intercon had at no point of time since 1989 challenged the authority of Kwality Catering Services or the right of the said Ashar to put up the hoarding

and display advertisement on the terrace over the second floor. Taking overall view of the matter at this stage the claim of Ashar will have to be accepted.

10. According to the Appellant they derive right which originates from the Deed of Assignment in favour of Agarwal dated 28th August, 1997, which pertains to first floor premises in the suit building and another Deed of Assignment in favour of Agarwal dated 1st September, 1997 which pertains to second floor in the said building. The second floor premises are lateron purchased by Intercon under the sale certificate issued on 10th March, 2004. Taking these documents as it is, at best, it is seen that the appellant Intercon has acquired undivided right to the extent of 2/3 area in terrace portion. However, these documents in no way affect the right of Ashar which was already created and enjoyed by them, as has been rightly held by the trial Court. This is so because, the Assignment Deed dated 28th August, 1997 which pertains to first floor, clause (g) thereof provides that the assignor has not entered into any agreement or executed any document of documents for sale, transfer and assignment or grant of leave and licence or created any third party

rights in respect of the said premises. The recital clause(ix) of the agreement provides that each of the assignees hereto is a tenant of a portion of the first floor of the building and the Assignees have accordingly agreed to purchase from the assignor all the assigner's right, title and interest in the entire first floor admeasuring 6600 sq.ft. or thereabout of the building known as Kwality House situated at Kemp's Corner,Mumbai 400 036 together with 1/3 undivided interest in the land on which the said structure stands and ½one third undivided interest in the common areas together with access from the ground floor of the building and proportionate additional FSI as and when available at or for the lumpsum price of Rs.51 Lakhs. In clause (1) of the agreement on which reliance was placed, it makes reference to 1/3 undivided share in the main access from the ground floor of the building, together with 1/3rd undivided interest in the terrace. That clause however, provides that in future proportionate additional FSI is available for additional floors-1/3 of the same will be available to the assignees for their exclusive use, further assignee shall have right to put up hoarding on the said building. Relying on this clause it was contended on behalf of the appellant that the

Intercon derived 1/3 undivided interest in the terrace portion, on account of this agreement.

11. Even so, that does not mean that the right which was already created in favour of Ashar under the original agreement dated 2nd August, 1989 and Subsequent agreements dated 1st August, 1994 and 1st August, 1997 and lastly on 25th July, 2002 can be said to be without any authority. For, the original owners and their representatives continued to have right in the terrace to the extent of 2/3 undivided interest at the relevant time. Besides, the undivided interest in favour of the predecessor of Intercon, by virtue of this agreement and another assignment agreement dated 1st September, 1997, at best is to the extent of 2/3 "undivided interest" in the terrace portion as is rightly noted by the trial court. The 2/3 undivided interest has been created in favour of predecessor of Intercon only after the assignment deed of 1st September, 1997. Whereas, agreement in favour of Ashar is dated 1st August, 1997 for a period of five years. Be that as it may, in so far as Intercon is concerned it would succeed to the said 2/3 undivided interest in the terrace only upon issuance of Sale Certificate dated March 10, 2004, Besides, that right was to be exercised

subject to the other obligations under the said agreement. This is so because, in terms of the subject agreements, the property which was sold to Intercon was "as is what is and as is where is" basis. If the right to put up hoarding was already available to Ashar under the subsisting agreement on 25th July, 2002, the right created in favour of the Intercon will have to abide by the said arrangement. It is not the case of Intercon that the right created in favour of Ashar has been terminated by any legal notice either by the predecessor of Intercon or by Intercon itself. Emphasis is rightly placed on clause (10) of the agreement dated 10th September, 2004 on behalf of Ashar to reinforce the opinion already recorded above. The clause (10) of the said agreement provides that immovable property is sold subject to the subsisting covenants if any, in respect of the said immovable property such as right of way, easement etc. and all incidents of tenure affecting the same. It is further provided that assignee shall ascertain and satisfy himself about the same and shall not make any requisition on that account. The trial Judge has also referred to the second schedule of the agreement. Suffice it to observe that the right in favour of Ashar to erect hoarding and display advertisement on such hoarding

subject to obtaining appropriate permission of the concerned authority, was created as back as in August,1989 and it was subsisting on the date when the suit was instituted. It is also noticed from the materials on record that the hoarding erected by Ashar is still put up on the terrace of the suit building. Till November, 2004 Ashar was displaying advertisement of different agencies. In March, 2005 advertisement was displayed on the said hoarding. It is on 16th March, 2005, Ashar invited order from the trial court to allow him to atleast paint the hoarding with white colour. That order was invited because the advertisement which was displayed on hoarding was old advertisement and the tenure had already expired long back. Displaying that advertisement was causing embarrassment to Ashar as well as his client. The fact remains that the hoarding is still in place. The advertisement was displayed on the said hoarding till March, 2005, without any legitimate interruption from any quarter. Besides, there is already subsisting agreement in favour of Ashar to put up hoarding and display advertisement for a period of five years from 1st August, 2002 which period is still operating. If it is so, I have no hesitation in upholding the opinion expressed by the trial Court at this interim stage

that Ashar has subsisting right in respect of the hoarding which is already put up on the terrace portion.

12. To get over this position, counsel for the appellant Intercon would contend that the last agreement entered in favour of Ashar on 25th July, 2002 was without authority. This is so because, during the relevant period court receiver was already appointed in respect of the suit premises. As a result, no agreement could have been executed with regard to the said hoarding without prior permission of the court receiver. This argument has been rightly countered by the counsel for Ashar. It is rightly argued that court receiver was appointed essentially in respect of first floor premises. As a matter of fact second floor premises was not subject matter of mortgage. Therefore, there was no reason to appoint court receiver for second floor premises. In any case, the consent order which was obtained between the parties to which Ashar was not party, on 28th February, 2002, makes no reference to appointment of court receiver to the terrace portion. Clause two of the consent order specifically refers to second floor of the said building. No reference is made to the terrace portion of the building.

Viewed thus, there was no occasion to approach the Court Receiver for prior permission to enter into any agreement relating to terrace portion. It is not necessary for this court to go into the controversy as to in what manner minutes of the order has been obtained between the Intercon and CRC Carriers Ltd. and Bank of Rajasthan in proceedings before the Debt Recovery Tribunal against which matter came before this court. Suffice it to observe that court receiver was not appointed in respect of the terrace portion. Moreover, there was no injunction operating against owners or their representatives to enter into any further agreement with regard to the subject hoarding. According to the appellant Intercon however, court receiver was appointed not only with regard to the first floor and second floor but also incidental rights available in respect of the said premises to the extent of 1/3 undivided interest in the terrace portion of the respective premises. The second floor has been lateron purchased by Intercon under sale certificate dated 10th March, 2004. The appellant has acquired one third undivided interest in the terrace portion on account of said sale certificate which is referable to second floor. The fact remains that the right acquired by Intercon cannot and does not affect the "undivided interest"

of the original owners and their representatives in the terrace. In other words, commitment made by and on behalf of the original owners will bind the Intercon who have succeeded to 2/3 undivided interest therein though, till lawfully terminated. Be that as it may, the question is whether the right which was acquired by Ashar initially in August, 1989 and continued by subsequent agreements lastly dated 25th July, 2002 is still subsisting. And is it possible to take the view that Ashar has no right at all with regard to the suit hoarding. The answer in my opinion is in the affirmative in favour of Ashar. As noted earlier, Ashar has subsisting right in respect of the subject hoarding. That right has not been lawfully terminated so far. Needless to observe that the consequence of unjust or illegal obstruction created by Intercon depriving Ashar from commercially exploiting the suit hoarding during the relevant period is an issue to be answered in appropriate proceedings.

13. To get over this position it was argued on behalf of the appellant Intercon that the agreement dated 25th July, 2002 on which reliance was placed by Ashar is fabricated document. This aspect has been considered by the trial Court. The finding as

recorded in relation to this issue, to my mind, will have to be upheld. This is so because the trial court has rightly observed that relevant jurisdictional facts are not stated in the pleadings filed by the appellant Intercon on this aspect. In absence of proper pleadings in that behalf it is not open for the court to assume that the said document is a fabricated document. In any case, at this stage of proceedings, I am in agreement with the finding recorded by the lower court that the discrepancy in the date occurring in this document is obviously a clerical error. The said Ashar was not to be benefited on that count because the agreement in favour of Ashar dated 1st August, 1997 was still subsisting. The agreement dated 25th July, 2002 has been executed during such period and it is in the nature of extension of licence for further period of five years from 1st August, 2002. The fact remains that from August, 2002 Ashar continued to display hoarding and advertisement thereon till the institution of the suit without any interruption from any quarter confirms the claim of Ashar. Understood thus, the argument that document dated 25th July, 2002 is fabricated document does not commend to me.

14. That takes me to the last question, which was

pressed into service on behalf of the appellant Intercon. It was vehemently argued that the trial court has issued mandatory order directing the appellant to remove the lock put up by the appellant without there being any prayer in the notice of Motion in that behalf nor any separate or special reason recorded in the Judgment. Whereas, that direction has been passed mechanically as can be seen from clause 6 of the operative order. It is noted that the Court was told that there is lock put up by Intercon on the terrace for which reason the direction came to be issued. The learned counsel for the appellant relied on the decision of the Apex Court in the case of **Metro Marins and another V/s. Bonus Watch Co.(P) Ltd. & Ors., reported in (2004) 7 Supreme Court Cases 478.** Reliance was placed on the exposition in paragraph-7 of the Judgment; wherein reference is made to the earlier decision of the Apex Court in **Dorab Cawasji Warden Case**, which has taken the view that Interim (mandatory) injunction can be granted only in the exceptional cases coming within the exceptions noticed in the said Judgment. The argument seems to be attractive. However, what is overlooked is that Ashar had filed suit before the trial court on the assertion that till recently Ashar was enjoying facility of terrace portion whenever

required for displaying advertisement on the hoarding. From Paragraph-44 onwards in the plaint, it is asserted by Ashar that person identifying himself as Amit Dholakia was creating obstruction to the workers and mechanics of Ashar of having access to the suit hoarding. It is stated that a watchman was recently employed by said Amit Dholakia and lock was put on the entrance to the terrace which action was unilateral. In paragraph-45 of the plaint, it is stated that the plaintiff contacted representative of the owner and also addressed a letter pointing out that for changing the display of the material fixed on the suit hoarding, it was necessary for the workers and mechanics of the plaintiff (Ashar) to have access. It is specifically noted in the paragraph-45 that whenever the workers or mechanics of the plaintiff were required to have access to the said hoarding till about July, 2004, whenever such request was made to the Manager of the Chinese Room Restaurant, he used to give the key of the lock to the terrace of the building. However, in the last one month before filing of the suit, plaintiff Ashar was experiencing great deal of difficulty in sending the workers to the suit terrace who were denied access at the instance of said Amit Dholakia . In paragraph 45 specific instance has been noted as to

how access was denied by the watchman on duty to the workers of plaintiff Ashar. Suffice it to observe that clear case has been made out that till 2nd week of November, 2004 the plaintiff had no difficulty in having access to the said hoarding but the same has been experienced recently at the instance of Amit Dholakia. The suit is filed in December, 2004 for the reliefs already reproduced earlier. The said Ashar took out notice of motion for interim relief which is consistent with relief (b) of the plaint. Limited protection sought by the plaintiff Ashar is one of the injunction against defendants in particular appellant Intercon from obstructing, causing any hindrance or obstacles to the plaintiff Ashar from displaying advertisement on the suit hoarding between second floor and terrace of the building owned by Kwality Catering Services and for the purpose of enabling the workers, mechanics, painters, electricians and/or representatives of plaintiff Ashar to increase size of the board as per the Municipal sanction, change/replace the display on the Suit hoarding under and or attend to, paint, rectify, repair and/or replace the suit hoarding or any part or portion thereof.

15. The question is whether the grant of relief

in favour of Ashar by the trial court directing the appellant Intercon to remove the lock can be said to be mandatory order in that sense. In my opinion, the nature of order passed is only to effectuate the order of injunction which is passed in favour of the plaintiff Ashar on the finding that he had subsisting right to display the suit hoarding for which he was entitled to have access to the hoarding. In that sense, it is not an order of dispossession of the appellant Intercon from the terrace portion. All that is provided by this order is to remove the lock or obstruction put up by the appellant on the entrance of the terrace whenever the plaintiff Ashar himself or his workers would require entry to the terrace for the replacement of advertisement and to carry out certain repairs of the suit hoarding. Viewed thus, it cannot be said to be a mandatory order so as to dispossess the appellant Intercon from the terrace portion or for that matter positively after the situation to the deteriment of the appellant to one different from it obtained just before the appellant caused to put up the lock on the terrace and created obstruction for Ashar to have free access to the terrace for the purpose of carrying on repair or change the advertisement on the hoarding. In equity, a person cannot be allowed to

take advantage of his own wrong. Accordingly, reliance placed on the decision of the Apex Court in the case of **Metro Marins(supra)** will be of no avail to the fact situation of the present case for the view that I have already noted above. Even if the order passed by the trial court was to be taken as mandatory order I find substance in the argument of the plaintiff Ashar that in the fact situation of the present case the court was justified in directing the appellant Intercon to remove the lock put up on the door which provides access to the terrace to approach the suit hoarding. The reported decision makes reference to earlier decision of **Dorab Cawasji's case(1990) 2 SCC 117.** Exposition in paragraph-16 of that case has also been reproduced in paragraph-6 of the reported Judgment. Counsel for the plaintiff Ashar rightly contends that in fact earlier part of this extract would assist the case of plaintiff Ashar. It is observed that relief of Interlocutory mandatory injunctions are granted generally to preserve or restore status quo of the last "non-contested" status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party

complaining. In the present case, as is noticed earlier Ashar has been provided the access to the terrace whenever required to repair or change advertisement on the suit hoarding or to carry out repairs thereof. It is only from second week of November, 2004 obstruction was created to the plaintiff Ashar and his workers from entering the terrace to reach at the suit hoarding. It is in that backdrop matter was brought before the trial court. The plaint, as has been observed earlier, makes specific reference to such instances from paragraph 41 onwards. Moreover, the direction issued to Intercon is implicit in the relief claimed in the suit as well as the notice of motion. It is not as if that at the argument, for the first time grievance was made on behalf of the Ashar that lock has been put up by the appellant. That is not the case in hand, which impression was given to this court at the hearing. On the other hand, it is noticed from the pleadings that grievance of the lock having been put up on the door of the terrace and causing obstruction has been specifically made in the plaint. For the nature of injunction that has been passed by the trial court, it can be made effective only by requiring the concerned defendants to remove the lock as and when plaintiff Ashar would require entry in

the terrace portion for either changing the advertisement or repairing the suit hoarding. Viewed in this perspective, the direction given by the trial court to remove the lock is a just and equitable order and does not require any interference.

16. During the pendency of these appeals alongwith civil application nos.183/2006 and 184/2006, the appellants have placed on record that fair return in respect of the suit hoarding would be around Rs.3 Lakhs per month, which offer has been made by one Different Strokes Communication Pvt.Ltd. under letter dated 18th January, 2006. According to the plaintiff Ashar, this document is fabricated document only to suit the argument of the appellant. It is contended that the appellant be proceeded for having filed false affidavit before this court for which reliance is placed on the decision of reported Judgment in the case of **Murray & Co. V/s. Ashok Kr.Newatia & Anr. reported in (2000) 2 SCC 367 and** another decision in the case of **Dhananjay Sharma Vs. State of Haryana reported in 1995 SC 1795.** Emphasis was placed on the observation in paragraph 40 of the Judgment. It is however, not necessary for me to burden this judgment with those aspects raised on behalf of the plaintiff Ashar to counter the document

produced by the appellant dated 18th January, 2006. Those questions are left open to be decided in appropriate proceedings when filed. Besides, that aspect, in my opinion, is not relevant to decide the point in issue that arises for consideration. The question is regarding grant or non-grant of injunction as prayed for by the plaintiff Ashar.

17. For the reasons recorded earlier, in my opinion, no fault can be found with the conclusion reached by the trial court in making notice of motion taken out by the plaintiff Ashar absolute in terms of prayer clause (a) and as a consequence directing the defendants in the suit to remove the lock put up on the terrace to facilitate the plaintiff Ashar to enter upon the terrace to change advertisement on the hoarding or carry out any repair either himself or through his workers. This however, does not mean that the terrace portion of the suit building will be in exclusive possession of the plaintiff Ashar but only limited entry will be permitted to plaintiff for that purpose as mentioned earlier. Thus following order is passed.

(A) Appeals as well Civil Applications

are dismissed.

(B) At this stage, counsel for the appellants Intercon prays that operation of this order may not be given effect to and the parties be directed to maintain status quo as of today for a period of four weeks to enable the appellants to take up the matter in appeal. Ordinarily, there would be no difficulty in accepting this request. However, in the present case as is noted earlier, the licence in favour of the Plaintiff Ashar is still subsisting and will last only till 31st July, 2007. The fact that there was no interim relief in favour of the plaintiff Ashar for all this time, does not mean that the position as obtained today should be allowed to continue. For, two courts have already examined the rival contentions. There is no difficulty if the appellants were not to accept the opinion recorded by two courts. But that does not mean that the appellants can ask for stay at the cost of Plaintiff Ashar. Every month’s delay, as is the case of the appellants before this Court is loss of income of Rs.3

Lakhs per month. Besides, the Plaintiff Ashar is obliged to pay all the taxes and outgoings in respect of the suit hoarding to the local authority. Accordingly, the appellants may ask for stay but on condition that they will have to compensate the plaintiff Ashar at the rate of Rs.3 Lakhs per month for the proportionate period for which the stay would operate in the event the proposed appeal before the Apex Court was to be dismissed. When this suggestion was given to the counsel for the appellants, prayer for stay was not pressed. In that case, there is no question of granting any stay or directing the parties to maintain status quo as of today.

(C) Operative part of the order of this Order passed today be issued under the signature of Sheristedar of this court.